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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PHILIP KENT COHEN, Plaintiff and Appellant, v. DIRECTV, INC., Defendant and Respondent.	B204035 (Los Angeles County Super. Ct. No. BC337933)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter D. Lichtman, Judge. Affirmed.

King & Ferlauto, William T. King, Thomas M. Ferlauto for Plaintiff and Respondent.

Kirkland & Ellis, Melissa D. Ingalls, Rebecca Wahlquist, Shaun Paisley for Defendant and Respondent.

This is the second of two lawsuits brought by appellant Philip Kent Cohen against respondent DIRECTV, Inc. In his first lawsuit, Cohen, a DIRECTV customer, is challenging respondent's business practices. Cohen successfully resisted DIRECTV's attempt to compel arbitration in the first lawsuit, after the court found that respondent's arbitration clause is unconscionable. In the second lawsuit, Cohen seeks to recover attorney fees he incurred while resisting respondent's motion to compel arbitration in the first lawsuit. The trial court sustained respondent's demurrers without leave to amend and dismissed Cohen's complaint.

The court's ruling is correct. If Cohen wants to recover attorney fees he incurred in the first lawsuit, his remedy is to seek attorney fees in the *still-pending* first action, not to institute a second lawsuit. Further, the demurrer was properly sustained because respondent's arbitration clause was not unconscionable on its face at the time it was added to the customer agreement.

FACTS

Cohen I

In 2004, Cohen filed a lawsuit against respondent, which we take judicial notice of and refer to as *Cohen I*. *Cohen I* is styled as a class action by respondent's subscribers. Claiming unfair business practices and a violation of the California Consumer Legal Remedies Act (CLRA), *Cohen I* alleges that respondent reduced the quality of its high definition signal, in violation of its advertising claims. The class members claim damage because they paid for (a) a high definition package that they did not receive and (b) respondent's decoder box.

Respondent moved to compel arbitration in *Cohen I* based on an arbitration clause in its customer contract, which precluded customers from bringing class actions. The trial court denied the motion to compel arbitration, on the grounds that the contractual term barring class actions is unconscionable. That ruling was affirmed on appeal by Division Eight of this District in *Cohen v. DIRECTV, Inc.* (2006) 142 Cal.App.4th 1442. On remand, Cohen sought class certification, which the trial court denied. Cohen's

appeal from the trial court's denial of class certification is now pending in Division Eight. (Case No. B204986.)

The Current Lawsuit

In August 2005, Cohen filed the current lawsuit against respondent. The current lawsuit asserts a single cause of action for violation of the CLRA. The CLRA violation stems from the trial court's ruling in *Cohen I* that respondent's class action waiver clause is unconscionable. Cohen alleges that respondent "violated the CLRA by attempting to amend [its] customer agreement on October 1, 2004 to ban class and representative actions. The arbitration provision, which Defendants attempted to add to the Customer Agreement by means of a 'bill stuffer,' included a ban on class and representative actions. This rendered the arbitration agreement unconscionable and unenforceable." Cohen lists his actual damages as "the reasonable attorney's fees incurred resisting DirecTV's motion to compel arbitration" in *Cohen I.*

The Demurrer and Ruling

Respondent's demurrers to the complaint list six reasons why the action fails. The trial court sustained the demurrers on all six grounds listed in respondent's moving papers. It found that (1) Cohen lacks standing to sue because he has not suffered damage under the CLRA; (2) Cohen's claim is preempted by federal law; (3) California law on class arbitration waivers was not settled and the waiver was not unconscionable when respondent inserted it into the customer agreement; (4) Cohen did not comply with CLRA's notice requirements; (5) Cohen's request for injunctive relief is nonjusticiable; and (6) Cohen "has improperly split an alleged continuing claim between two lawsuits," i.e., between *Cohen I* and the current lawsuit.

DISCUSSION

1. Appeal And Review

The trial court wrote, "this Court hereby sustains DIRECTV's demurrer and dismisses Plaintiff's complaint without leave to amend . . . ." The order was signed by the court. (Code Civ. Proc., § 581d.) The dismissal constitutes an appealable order. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We review de

novo the ruling on the demurrer, exercising our independent judgment to determine whether a cause of action has been stated as a matter of law. (*Ibid*.)

2. Ruling On Demurrer

a. Splitting A Cause Of Action

Respondent contends that Cohen improperly split a cause of action by filing the current lawsuit when his remedy is to seek attorney's fees within the *Cohen I* litigation. Appellant concedes that "[i]t is true that these claims [in *Cohen I* and in the current lawsuit] could have been brought in a single action"; however, his argument continues, "there is nothing that requires [it]."

The premise of appellant's claim in *Cohen I* is that respondent failed to deliver the high definition television signals it promised to its customers, in violation of the CLRA. However, respondent interjected a subsidiary issue into *Cohen I*, which was fully litigated in that proceeding. Specifically, the issue was whether a ban on class litigation contained in respondent's arbitration clause forestalled the claims being made in *Cohen I*. (*Cohen I*, 142 Cal.App.4th at p. 1446.) Respondent's attempt to enforce the arbitration clause was rejected by the trial court and the appellate court in *Cohen I.*

Ordinarily, an appellate court's unqualified affirmance ends the litigation. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.) The affirmance in *Cohen I* did *not* end the litigation. The arbitration statutes allowed respondent to pursue an interim appeal from the denial of its petition to compel arbitration. (Code Civ. Proc., § 1294, subd. (a).) The appellate court in *Cohen I* acted to "affirm the trial court's order refusing to compel arbitration . . . ." (142 Cal.App.4th at p. 1444.) It did not reach the merits of Cohen's claims, which were not sent into arbitration, and continue on in the trial court. As a result, when the matter was returned to the trial court following the appellate ruling denying arbitration, nothing prevented Cohen from amending his complaint to allege an additional remedy under the CLRA or assert a claim for attorney's fees.

The claim being made in the current lawsuit arises from respondent's motion to compel arbitration in *Cohen I.* The current lawsuit alleges that "Plaintiffs have been

damaged as follows: [¶] a. Actual damages in the form of the reasonable attorney's fees incurred resisting DirecTV's motion to compel arbitration" in *Cohen I,* plus (b) incidental and consequential damages and (c) interest.

The primary right theory is used to determine "whether a party may plead more than one cause of action or bring more than one lawsuit arising from the same facts." (*Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1005.) "The cases have invoked the rule against splitting causes of action in order to abate a later suit or bar it on res judicata grounds when that suit alleged a different theory of recovery for the same injury . . . or a different remedy for the same injury." (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 642.) *Ibid*.) The rule prevents a plaintiff from "asserting claims which properly should have been settled in some prior action." (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 894-895.)

The issue of whether Cohen should receive attorney fees to resist respondent's motion to compel should be resolved in *Cohen I.* The CLRA mandates an award of fees to a prevailing party. (Civ. Code, § 1780, subd. (d).) The award is based upon "'which party achieved its litigation objectives.'" (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 178-179; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150.) The court that handled the litigation is the venue where attorney fees should be determined "because it is in the best position to evaluate the services rendered by an attorney in its courtroom." (*Kim v. Euromotors West/The Auto Gallery, supra,* 149 Cal.App.4th at p. 181.) Filing a new lawsuit created duplicative and entirely unnecessary litigation when the proper procedure is to file a motion for attorney fees in *Cohen I.* (See *Kim v. Euromotors West/The Auto Gallery, supra,* 149 Cal.App.4th at p. 175.)[1]

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[1] We observe that once the appeal pending in Division Eight is resolved, *Cohen I* will continue on, either as a class action or as an individual claim by Cohen, depending on the outcome of the appeal. In any event, the litigation in *Cohen I* is far from over.

b. Cohen Cannot Bring A Claim Contending That Respondent Knew Its Arbitration Clause Was Illegal When It Was Adopted in 2004

The current lawsuit alleges that respondent "violated the CLRA by attempting to amend [its] customer agreement on October 1, 2004 to ban class and representative actions. . . . This rendered the arbitration agreement unconscionable and unenforceable." The issue raised here is whether the law as it existed in 2004 made respondent's arbitration amendment illegal on its face.

At the time that respondent amended its customer agreement in 2004 to ban class actions, "there was a split of authority in California on the enforceability of class action waivers in consumer contracts." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 451.) Further, the case law was unsettled on the issue of whether this type of arbitration clause was preempted by the Federal Arbitration Act (FAA). (9 U.S.C. § 2.) One case held that a credit card company's imposition of a ban on class actions in an arbitration clause is procedurally and substantively unconscionable. (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1099-1102.) However, the *Szetela* opinion did not address whether the arbitration clause was preempted by the FAA.[2]

The issues of unconscionability and FAA preemption were addressed in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*). The Supreme Court observed that a prior decision involving a classwide arbitration agreement, *Keating v. Superior Court* (1982) 31 Cal.3d 584, "did not answer directly the question whether a class action waiver may be unenforceable as contrary to public policy or unconscionable." (*Discover Bank, supra,* 36 Cal.4th at p. 158.) The court determined that a class action waiver clause is unconscionable when it "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with

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[2] Also, *Szetela* did not involve the CLRA. (97 Cal.App.4th at p. 1097.)

the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . ." (*Id.* at pp. 162-163.) With regard to FAA preemption, the Supreme Court stated that "the FAA does not federalize the law of unconscionability . . . except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses. [Citation.] There is no such discrimination here with respect to California's rule against class action waivers." (*Id.* at p. 167.)

It is important to emphasize that the Supreme Court has *not* adopted a blanket rule forbidding class action waivers. In *Discover Bank*, the Court wrote, "[w]e do not hold that all class action waivers are necessarily unconscionable." (36 Cal.4th at p. 162.) More recently, the Supreme Court had another opportunity to declare class action waivers to be categorically unconscionable, but declined to do so. Instead, it wrote that a trial court must determine whether in any particular case, "class arbitration would be a significantly more effective means than individual arbitration" to vindicate the rights of a group. (*Gentry v. Superior Court, supra*, 42 Cal.4th at p. 466.) Thus, class action "waivers will only be invalidated after the proper factual showing . . ." is made. (*Ibid.*)

Cohen's claim assumes that respondent knew, in 2004, that its class action waiver clause was invalid as a matter of law. That claim cannot be maintained. Respondent could not have known in 2004 whether its class action waiver clause was invalid because (1) the case law was unsettled on the issue of these waivers; (2) it was unclear whether federal law (the FAA) controlled these clauses; (3) there was not then (nor is there yet) any blanket prohibition on class action waiver clauses; and (4) the unconscionability determination can only be made on a case-by-case basis, and in 2004 no court had evaluated respondent's class action waiver clause and declared it to be unconscionable, based on the particular facts of this case. The evaluation of respondent's clause did not occur until *Cohen I* was decided. (*Cohen v. DIRECTV, Inc., supra*, 142 Cal.App.4th at pp. 1451-1453.)

c. Remaining Arguments

In light of our discussion in the preceding sections, we find that the demurrers were properly sustained without leave to amend. We need not reach the remaining grounds cited by the trial court and the parties.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.